Filed 4/11/17 P. v. Rees CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MORGAN RAMSEY REES, Defendant and Appellant.	H043415 (Santa Cruz County Super. Ct. No. F24434)

After the electorate approved Proposition 47 in November 2014, defendant Morgan Ramsey Rees filed an application to redesignate his conviction for unlawful driving or taking of a vehicle (Veh. Code, § 10851)[1] to a misdemeanor. The trial court denied the application. On appeal, defendant contends that section 10851 can be reduced to a misdemeanor under Proposition 47.[2] He also contends that his felony conviction violates his right to equal protection. We affirm the order.

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1 All further statutory references are to the Vehicle Code unless otherwise stated.

2 The issue of whether Proposition 47 applies to the offense of theft or unauthorized use of a vehicle (§ 10851) is currently before the California Supreme Court in *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793.

I. Statement of the Case

In May 2013, defendant pleaded no contest to unlawful driving or taking of a vehicle (§ 10851) and driving under the influence of drugs (§ 23152, subd. (a)). The remaining charges of receiving stolen property, a motor vehicle (Pen. Code, § 469d, subd. (a)), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), hit and run driving (§ 20002, subd. (a)), driving without a license (§ 12500, subd. (a)), and possession of burglar tools (Pen. Code, § 466) were dismissed. The trial court suspended imposition of sentence and placed defendant on probation for three years.

After several probation violations, the trial court terminated defendant's probation on June 2, 2014, and imposed an eight-month prison term to run consecutively to an unrelated sentence.

In February 2016, defendant filed an application for redesignation as a misdemeanor (Pen. Code, § 1170.18, subd. (f)). The trial court found that the vehicle was worth less than $950, but denied the application.

II. Statement of Facts

On or about March 16, 2013, defendant drove a 1987 Toyota pickup without the consent of the owner. On or about the same date, defendant drove a vehicle while he was under the influence of drugs.

III. Discussion

Proposition 47 established procedures for reclassifying specified nonserious and nonviolent property and drug crimes as misdemeanors by adding Penal Code section 1170.18. This statute provides in relevant part: "A person . . . serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty

of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (Pen. Code, § 1170.18, subd. (a).) "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (Pen. Code, §1170.18, subd. (f).)

"[O]ur interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. [Citations.] We therefore first look to 'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.' [Citations.]" (*People v. Park* (2013) 56 Cal.4th 782, 796.) "'"When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." [Citation.]' [Citation.]" (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.)

Penal Code section 1170.18, subdivision (a) does not identify section 10851 as one of the code sections amended or added by Proposition 47. Moreover, Proposition 47 did not amend language in section 10851, subdivision (a), which provides that a violation of the statute is punishable as either a felony or a misdemeanor. Defendant, however, focuses on Proposition 47's addition of Penal Code section 490.2, which states in relevant part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be

considered petty theft and shall be punished as a misdemeanor . . . ." (Pen. Code, § 490.2, subd. (a).)

Defendant argues that Penal Code section 490.2 broadens the scope of petty theft to include a violation of section 10851.

Defendant's statutory interpretation is not persuasive. Penal Code section 490.2 amends the definition of grand theft, as set forth in Penal Code section 487 or any other provision of law, to include certain offenses that would have previously been grand theft to be petty theft. However, section 10851 is not included in Penal Code section 490.2, as Penal Code section 487 is. Nor can section 10851 be considered "any other provision of law defining grand theft." (Pen. Code, § 490.2.) Section 10851 does not define the taking of a vehicle as grand theft and is much broader than statutes that prohibit theft. A theft is committed only if the defendant intends to permanently deprive the owner of his or her property (*People v. Abilez* (2007) 41 Cal.4th 472, 510), while a defendant can violate section 10851 if he or she either takes a vehicle with intent to steal it or by driving it with the intent only to temporarily deprive the owner of its possession. (*People v. Garza* (2005) 35 Cal.4th 866, 871.) Thus, Penal Code section 490.2 does not apply to defendant's conviction.

Defendant argues that since Proposition 47 amended Penal Code section 666, which contains references to section 10851 as "auto theft," all violations of section 10851 are "theft" as defined in Penal Code section 490.2. However, Proposition 47 did not categorize all violations of section 10851 as thefts. Proposition 47 restated language in Penal Code section 666, which provided that prior convictions for certain offenses including "auto theft under Section 10851 of the Vehicle Code" could be used as a predicate to charge a felony offense. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 72.) Nothing in this amendment purported to recharacterize all violations of section 10851 as thefts.

Defendant next claims that construing Penal Code section 490.2 to apply to section 10851 violations would effectuate the voters' intent "'to maximize alternatives for nonserious, nonviolent crimes.'" He maintains that "[t]here is nothing inherent to vehicle thefts worth less than $950 that makes those thefts more serious or violent than thefts of any other property worth less than $950." We disagree. The taking of a vehicle is different from other thefts because it can lead to property damage, serious injury, or death.

Defendant also argues that excluding section 10851 from relief under Proposition 47 "would create an anomaly, unintended by the voters." He points out that if he had been convicted of a violation of Penal Code section 487, subdivision (d)(1) based on the same conduct, he would be eligible for reduction of the offense to a misdemeanor. He points out that since he was convicted of a felony for violating section 10851, he is not eligible for such a reduction. Our interpretation of Proposition 47 is not anomalous. Under certain circumstances, the taking of a vehicle in violation of section 10851 is more serious than the theft of a vehicle in violation of Penal Code section 487, subdivision (d)(1).

Alternatively, defendant contends that it would violate his right to equal protection to interpret Penal Code section 490.2 to reduce vehicle theft violations under Penal Code section 487, subdivision (d)(1) to misdemeanors while leaving violations of section 10851 as felonies.

"'Broadly stated, equal protection of the laws means "that no person or class of persons shall be denied the same protection of the laws [that] is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness." [Citation.]' [Citation.] . . . [A] threshold requirement of any meritorious equal protection claim 'is a showing that the state has adopted a classification

that affects two or more *similarly situated* groups in an unequal manner. [Citation.]' [Citation.]" (*People v. Guzman* (2005) 35 Cal.4th 577, 591-592.)

"'In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment . . . we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. [Citations.] Classifications based on race or national origin . . . and classifications affecting fundamental rights . . . are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. [Citations.]' [Citations.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837 (*Wilkinson*).)

Even assuming that defendant could satisfy the similarly-situated requirement, his equal protection claim fails. In *Wilkinson*, *supra*, 33 Cal.4th 821, the defendant argued that his conviction of battery on a custodial officer violated equal protection, because statutes authorized greater punishment for battery on a custodial officer without injury than for battery on a custodial officer with injury. (*Id.* at p. 832.) In applying the rational basis test, the California Supreme Court rejected the defendant's challenge. The court stated that "neither the existence of two identical criminal statutes prescribing different levels of punishment, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*Id.* at p. 838.)

Here, there is a rational basis for the distinction in treatment between Penal Code section 487 and section 10851 under Proposition 47. The electorate could have rationally concluded that the omission of section 10851 in Proposition 47 allowed for prosecutorial discretion in charging certain vehicle takings as felonies based on the defendant's background, the severity of the crime, and other factors. (*Wilkinson*, *supra*, 33 Cal.4th at pp. 838-839.) Thus, there was no violation of defendant's equal protection rights.

IV. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.